(5)

No. 91-2086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GRANITE STATE INSURANCE COMPANY,
Petitioner,

v.

TANDY CORPORATION AND
T. C. ELECTRONICS (KOREA) LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

I. Does the "exceptional circumstances" test for federal abstention apply to declaratory judgment actions?

II. Does application of the *Colorado River* factors in and of themselves result in favoring abstention in declaratory judgment actions?

III. Should a trial court's decision to abstain in a declaratory judgment action be reviewed *de novo* or by an abuse of discretion standard?

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BRIEF OF RESPONDENTS

The respondents, Tandy Corporation and T.C. Electronics (Korea), Ltd.,[1] file this brief in opposition to the brief of petitioners, Granite State Insurance.

STATEMENT OF THE CASE

Granite State Insurance Company would have the Court believe that its preemptive declaratory judgment suit was an act of

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[1] A listing naming all parent companies and subsidiaries of Tandy Corporation and T. C. Electronics (Korea) Ltd., has been made in footnote #1 of Respondents' Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which was previously filed.

last resort when faced with a recalcitrant insured. Nothing could be farther from the truth.

In January, 1990, within days of confirming that insured losses had been sustained at its plant in Masan, Korea, Tandy Corporation gave notice of this loss to Granite State as well as to other involved insurers. (R.II,175)(J.A.17).[2] Granite State's response was swift. Within days, it issued a reservation of rights letter in which it set forth the basis upon which it later claimed it was entitled to relief in its later filed declaratory judgment suit. (J.A. 90-98) Simultaneously, Granite State surreptitiously employed attorneys and ex-CIA agents to find some way, indeed any way, to avoid its contractual obligations.

The particular insurance involved was a warehouse endorsement to a global marine policy that provided coverage for inventory at a number of inland locations around the world, including inventory located at Tandy's Massan, Korea plant. (J.A. 26-83). The losses sustained by Tandy occurred during the policy period in which Granite State insured this inventory. It should be noted, however, that Tandy had the identical coverage with Utica Mutual Insurance Company before inception of the Granite State policy. Granite State's policy of insurance was not new coverage but simply was replacement coverage for the policy previously issued by UTICA. After notifying the insurers of the substantial losses it had sustained, Tandy went about the business of gathering information necessary to quantify the loss for its insurers. Tens of thousands of documents were produced and adjustors and accountants representing American International Underwriters Corporation (AIU), as well as representatives of Alexander & Alexander of Texas, Inc. (A & A), spent weeks in the Far East investigating the loss. The conduct of Tandy of providing information to AIU and A & A was not only consistent with its

[2] Record references are cited as "R.II ___." The Joint Appendix filed in this case is cited as "J.A. ___"

obligations under its policy of insurance with Granite State, it was mandated. Specifically, the insurance policy provides:

> In cases of loss or other claim such loss or claim to be paid within thirty (30) days after submission to the Company or to the
>
> AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION AND/OR ALEXANDER & ALEXANDER OF TEXAS, INC.
>
> of proper proof of loss . . . . (J.A. 53).

This effort to quantify the loss took months. During this period, as part of its scheme to bolster the "defenses" that it concocted immediately upon receiving notice of the loss, Granite State wished to ignore receipt of information by A & A and AIU, who under Granite State's policy were the appropriate alternative entities to receive that information. Furthermore, Granite State had made the decision, certainly by March of 1990, that it would not honor Tandy's claim under any set of circumstances, despite knowing full well that Tandy was diligently attempting to quantify that claim for submission to the company.

In December, 1990, Tandy filed its claim with Granite State for the policy limits of $10,000,000, which represented damage to insured property and but only a fraction of Tandy's total economic loss. (R.II,43,186). Granite State did not honor or deny the claim within thirty days of its receipt.

Instead, it brought suit in the United States District Court for the Southern District of Texas, Houston Division, seeking a declaratory judgment alleging, *inter alia*: (1) that A & A, a Dallas-based Texas corporation, who was the broker and only entity that dealt with Granite State at the time of the issuance of the policy, had made misrepresentations or failed to disclose material facts that Granite State believed voided the policy *ab initio*; and (2) that the losses that Tandy undoubtedly sustained

were losses occurring before the effective date of the Granite State policy and would be covered, if at all, under the policy issued by UTICA, Tandy's prior carrier. (J.A. 3-22). Granite State, in effect, was seeking a declaration that Tandy's losses were not its problem, but were the problem of either A & A or UTICA.

The lengthy complaint filed by Granite State in the district court went into substantial detail concerning why it believed its policy was void, and contained numerous allegations that "Tandy and/or A & A" made misrepresentations or failed to disclose material facts at the time the Granite State policy was issued. (J.A. 19). As Granite State well knew, no employee of Tandy had any contact whatsoever with the underwriters for Granite State. All communications were between Granite State's Houston-based underwriters and A & A. The allegations in Granite State's declaratory judgment suit virtually mirrored the "defenses" it raised in its reservation of rights letter.

Granite State's declaratory judgment suit left Tandy with no choice. For the dispute to be fully resolved, it was necessary for Tandy to bring suit against Granite State, as well as A & A and UTICA, so that the party responsible for Tandy's losses could be identified and liability assessed. (R.II,99). The declaratory judgment suit filed by Granite State could not offer Tandy full relief nor could it even fully resolve the very issues that Granite State raised in its declaratory judgment suit. All parties necessary for a complete adjudication were not present in the district court, nor could they be.[3]

Simultaneously with the filing of the state court action in Tarrant County, Texas, Tandy answered Granite State's complaint and filed a motion asking the district court to decline to exercise its discretionary jurisdiction over Granite State's action

[3] Joinder of A & A and UTICA due to the citizenship of the parties involved was not an option as a result of 28 U.S.C. 1367(b) (Supp. 1992) because joinder would have destroyed the jurisdictional requirements of 28 U.S.C. § 1332 (Supp. 1992).

for declaratory relief and to dismiss or stay that suit until resolution of the state action. Recognizing Granite State's action as the preemptive strike it now unabashedly admits (Pet. brief at 33-35), the district court, applying the standards set forth in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983); and *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491 (1942), stayed this suit pending resolution of the state district court action.

The United States Court of Appeals, in affirming the district court, held that the district court did not abuse its discretion in granting the stay, and noted that state law, not maritime law, would likely apply to this dispute.

SUMMARY OF ARGUMENT

For historical, legal and policy reasons, a federal district court should have broad discretion to refuse to entertain a declaratory judgment action if there is a pending state action in which all issues can effectively be determined.

The judicially-formed "exceptional circumstances" test, which normally governs the determination of whether it is proper for a court to abstain, does not apply to declaratory judgment actions. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant because Congress created the Declaratory Judgment Act and specifically gave the courts discretion concerning whether to hear declaratory judgment actions.

This Court, in *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491 (1942), determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

In this case, Granite State was forum shopping when it filed the federal suit. Because of the tenor of the parties' relations, there can be no dispute that Granite State expected Tandy to file suit if its claims were denied. Rather than deny coverage, Granite State filed this declaratory judgment action. If it proceeded, this action would be duplicative of the state action. Furthermore, parties necessary for full adjudication are absent. Through the mechanism of declaratory relief, this suit could not resolve the issues raised by Granite State's complaint. The state action will.

The facts in this case demonstrate the sound policy reasons for allowing the courts broad discretion: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and 3) avoiding duplicative litigation.

In addition, the general abstention factors themselves run substantially parallel to the criteria that have been deemed relevant to a court's determination of whether to accept or decline jurisdiction over a declaratory judgment action. Particularly the concern over the danger of piecemeal litigation weighs in favor of abstention. Nonetheless, as applied to this case, these generally applied factors support abstention.

Finally, regardless of the standard of review applied — *de novo* or abuse of discretion — the appellate courts seem to reach the same result in reviewing the trial courts' decisions to abstain. The distinction appears to be one of form rather than substance. As applied to this case, either standard would have yielded the same result. Even so, all the factors relating to the allowance of broad discretion by the judge support an abuse of discretion standard in reviewing abstention in declaratory judgment actions. The standard is consistent with not only the Declaratory Judgment Act, but common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline a declaratory judgment

action, when, as here, that action cannot fully and finally resolve all issues in dispute.

ARGUMENT

I. A federal court has the discretion to refuse to entertain a declaratory judgment action if there is a pending state action in which all issues can effectively be determined.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and "exceptional circumstances" are required before abstention is proper. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983). When an action is one for declaratory judgment, however, the district court should have broad discretion to defer to a similar state action.

A. The Declaratory Judgment Act does not obligate a district court to exercise its jurisdiction in a declaratory judgment action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), is discretionary. *Public Affairs Assocs., Inc. v. Rickover,* 369 U.S. 111, 112 (1962) (per curiam). The Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Id.*; *See also* EDWIN BORCHARD, DECLARATORY JUDGMENTS at 231-41 (2nd ed. 1941). Congress appears explicitly to have authorized the exercise of discretion by

using the word "may" in the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982). David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 548 n. 24 (1985) (discussing "traditional" equitable discretion not to proceed). The way to guarantee that district courts retain the discretion afforded under the Act is through analysis under the Act. *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 877 F.2d 1213, 1223 (3rd Cir. 1989).

The legislative history of the Declaratory Judgment Act itself shows that "large discretion is conferred upon the courts as to whether or not they will administer justice by the procedure." *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934).[4] A district court is under no requirement to hear the declaratory judgment action before it can exercise its discretion to decline to enter the requested relief. The duty of a court to exercise its jurisdiction is not automatic or obligatory. *Brillhart*, 316 U.S. at 491; EDWIN BORCHARD[5], DECLARATORY JUDGMENTS 312-13 (2nd ed. 1941); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 2759 at 644 (1983) (noting that the draftsmen of the Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction).

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[4] Granite State's representation of the content of the legislative history is incorrect. Granite State claims that the legislative history of the act "makes it clear that the courts have no discretion to decline to hear a declaratory judgment action, but *must* allow the litigants an opportunity to be heard." (Pet. Brief at 14). Nowhere in the reports cited by Granite State is there any such implied, much less, explicit requirement. The report says the opposite. *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). Even so, *Brillhart* puts this issue to rest. *Brillhart*, 316 U.S. at 494.

[5] Edwin Borchard is a co-draftsman of the Uniform Declaratory Judgments Act. Granite State implies that Prof. Borchard supports its position that a district court must hear the declaratory judgment action. The opposite is true. Specifically, Prof. Brochard wrote: "There is nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court even if the parties are proper and jurisdictional amount present." EDWIN BORCHARD, DECLARATORY JUDGMENTS at 313 (2nd ed. 1941).

The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory remedies. *See Green v. Mansour*, 474 U.S. 64, 72 (1985). In declaratory judgment actions, the courts are under no compulsion to exercise their jurisdiction and ultimately, the decision whether to defer to the concurrent jurisdiction of a state court is . . . a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494. Thus, a federal court's obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief. *See generally* Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677 (1942).

In addition, the reason that the "exceptional circumstances" test does not apply to declaratory judgment actions arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. One court determined that the importance of *Colorado River* and *Moses H. Cone* "lay in the fact that the Supreme Court gave its imprimatur to a judicially formed rule of abstention based mainly on notions of judicial economy in an era of severely crowded federal dockets." *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988); *see also* Howard A. Davis, *The Doctrine of Abstention to Promote Judicial Administration*, 33 Trial Law. Guide 564, 564-66 (1990) (noting that the goal of *Colorado River* is wise judicial administration); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 Okla. L. Rev. 185, 187-91 (1989).

In its analysis, the *Algernon-Blair, Inc.* court stated that this Court was so wary of approval of the practice of abstention for inappropriate grounds that it imposed severe restrictions on the discretion of the lower courts. *Algernon-Blair, Inc.*, 705 F. Supp. at 1521. Such a policy concern does not apply to declaratory judgment actions. In contrast, a district court's discretion over

declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; 28 U.S.C. § 2201; Shapiro, *Jurisdiction and Discretion, supra,* at 548 n. 24.

Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of the test (e.g., that the federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction. *Terra Nova*, 887 F.2d at 1222.

B. Many of the sound policy reasons for allowing the district court broad discretion to defer to a similar state action are found in *Brillhart*.

This Court provided guidance for the exercise of discretion in declaratory judgment actions in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942). Under *Brillhart*, a district court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Id.* at 495.

The court's rationale in *Brillhart* had three principal bases: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; 3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). The case now before this Court demonstrates the sound policy underlying the *Brillhart* rationale and the reasons the trial court should be allowed to exercise its discretion in determining whether to hear declaratory judgment actions.

1. Granting broad discretion to the trial court avoids having federal courts needlessly determine issues of state law.

Federal courts should not needlessly determine issues of state law. The state's interest in deciding questions of state law has jurisdictional roots in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Congress has expressly left insurance law to the states through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1988).

This dispute is an insurance case governed by issues of state law. Granite State makes no claim that state remedies for resolution of the coverage issues are unavailable. Contrary to Granite State's assertions, the doctrine of *uberrimae fidei* does not charge the character of the dispute. (*See infra* § I.C.) As correctly noted by the Fifth Circuit, state law is probably applicable due to the nature of the issues involved.

Even if a ruling by the district court on the declaratory judgment action clarified rather than confused the legal relationships of the parties:

> [T]his clarification will come at the cost of "increas[ing] friction between our federal and state courts and improperly encroach[ing] upon state jurisdiction." The states regulate insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation.

Allstate Ins. v. Mercier, 913 F.2d 273, 279 (6th Cir. 1990).

A system of judicial federalism has enough inherent friction with the state system without the added aggravation of unnecessary federal declarations. *See Mitcheson v. Harris*, 955 F.2d 235, 240 (4th Cir. 1992). As one court noted:

> To have sustained this suit for declaratory judgment would have been to drag this essentially local litigation

> into the federal courts and to defeat the jurisdiction of the state courts over it merely because one of the parties to the litigation happened to have indemnity insurance in a foreign insurance company.

Indemnity Ins. Co. v. Schriefer, 142 F.2d 851, 853 (4th Cir. 1944). Here, Tandy, a Texas-based corporation, through its Texas-based broker, A & A, acquired insurance with Granite State through its Texas based underwriters.

Absent a strong countervailing federal interest, the federal court should not elbow its way into this controversy to render what may be "uncertain and ephemeral" interpretation of state law. *Penhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 122 n. 32 (1984).

2. Granting broad discretion to the trial court discourages litigants from filing declaratory judgment actions as a means of forum shopping.

The second *Brillhart* policy is the interest in avoiding the use by litigants of declaratory judgments actions as a means of forum shopping. One court has described this factor as relating to "the 'defensive' or 'reactive' nature of federal declaratory judgment suit[s]," and stated that if a declaratory judgment suit is defensive or reactive, that would justify a court's decision not to exercise discretion. *Transamerica Occidental Life Ins. Co. v. Digregorio,* 811 F.2d 1249, 1254 n.4. (9th Cir. 1987).

This suit was an attempt to forum shop. Rather than respond to claims filed by insureds, insurance companies are frequently seeking declaratory relief in federal court. Out of fear of being held accountable in state litigation or to deprive the insured of its choice of forum, the insurer brings a declaratory judgment action in federal court against its insured to obtain a ruling on its obligations in relation to a parallel state court action. *See* Stanley T. Koenig, *Federal Court Stays and Dismissals in Deference to Duplicative State Court Litigation: The Impact of Moses*

H. Cone Memorial Hospital v. Mercury Construction, 46 Ohio St. L. J. 435, 437-39 (1985) (discussing a "reactive" suit as a type of duplicative litigation). In most cases, the insurer is unable to remove the state court action to federal court due to lack of complete diversity under 28 U.S.C. § 1441(b) (1973). Diversity usually would be defeated because of the presence of other parties in the state court action who are likely to be citizens of the same state. Such is the case here. Regardless of the need for these additional parties and the state law nature of these disputes, diversity jurisdiction is usually present in the suit for declaratory relief because the insurer and the insured are citizens of different states. *See Continental Cas. Co. v. Robsac Indus.,* 947 F.2d 1367, 1371 n. 4 (9th Cir. 1991).

This manipulation of diversity jurisdiction underlies insurance companies' strategy of bringing of declaratory judgment actions against their insureds to avoid being a defendant in non-removable state court actions presenting the same issues of state law. This practice is an archetype of what the 9th Circuit terms "reactive" litigation. *Digregorio,* 811 F.2d at 1254 n.4. Reactive litigation can occur in response to a claim an insurance carrier believes is not subject to coverage even though the claimant has not yet filed the state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so. *Continental Cas. Co.,* 947 F.2d at 1372.

Such a preemptive strike is exactly what Granite State attempted in this case. The trial court specifically found that by initiating what is here the first-filed suit, Granite State intended to forestall a foreseeable state court suit by Tandy. (Order at 10.) Granite State filed this declaratory judgment action in anticipation of an action it knew would be filed immediately after it gave notice to Tandy of its intent to deny coverage.

Even through Granite State filed suit in federal court before Tandy filed its state court action, it formed that intention because

it was aware of Tandy's claim and hoped to preempt any state court proceeding. Whether the federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive. *Continental Cas. Co.*, 947 F.2d at 1372-73.

Anticipatory suits are disfavored because they are an aspect of forum shopping. As the Seventh Circuit stated in *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939):

> The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or choose a forum.

Id. at 617.

Permitting this declaratory judgment to proceed when there is a pending state court case presenting the identical issue would encourage forum shopping races to the courthouse. The consequences of Granite State's argument that a district court can not abstain if an insurance company decides to beat its insured to court would be virtually to license the preemptive strike by insurers so they can 1) fix venue they consider favorable or convenient to them and 2) avoid full adjudication of the insurance dispute by dictating who will be parties to the lawsuit. Furthermore, regardless of the degree of bad faith in which that declaratory judgment action is brought, the district court would have little or no discretion over whether to hear it.

3. Granting broad discretion to the trial court avoids duplicative litigation.

The next *Brillhart* policy favors dismissal of declaratory judgment actions in favor of resolving all litigation stemming from a single controversy in a single court system. Consideration of this issue favors the policy of avoiding duplicative litigation. To decide whether to entertain the declaratory judgment action, the federal court should analyze whether its resolution of the declaratory judgment action will settle all aspects of the legal controversy. As this Court wrote, for a federal court to charge headlong

into the middle of a controversy already the subject of state court litigation risks "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. at 495.

There is no sense, as a matter of judicial economy, for a federal court to entertain a declaratory judgment action when the result would be to "try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

Here, the policy of avoiding duplicative litigation would be frustrated by permitting the federal action to go forward during the pendency of the state court action. *See* 17A WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247 (2nd ed. 1988). Granite State can and has sought the same relief in the state action that it sought in the declaratory judgment action. The difference between the suits makes abstention even more compelling: there are additional parties whose claims can be resolved in the state action, that were not and could not be joined in the federal action. While Tandy cannot obtain full relief in the federal action, all of the issues presented by Granite State's declaratory judgment action can be resolved by the state court.

Tandy does not dispute the fact that the state court's suit will completely resolve the disputed coverage issues raised in the declaratory judgment suit. It will do that and much more. Indeed, the existence of an adequate alternative remedy, such as exists here, is a factor properly considered in any exercise of the district court's discretion. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2785 (2nd ed. 1983).

There is another policy basis favoring discretion by federal district courts that relates to the harm caused by piecemeal adjudication. In many declaratory judgment actions brought to resolve a duty to defend or indemnify an insured, there will be

overlapping issues of fact or law between the state and federal actions. If the federal court proceeds on the declaratory judgment action, the insured may be collaterally estopped from relitigating the overlapping issues decided in the federal action. *Mitcheson*, 955 F.2d at 239; Restatement (Second) of Judgments § 87 cmt. a (1982). Such issue preclusion would likely "frustrate the orderly progress" of state proceedings by leaving the state court with some aspects of the case closed from further examination but still other aspects in need of full scale resolution. *Phoenix Ins. Co. v. Harby Marina, Inc.*, 294 F. Supp. 663, 664 (N. D. Fla. 1969). Additionally, the state court will likely have to consult federal law to determine application of the preclusive principles. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986), *cert. denied*, 480 U.S. 9323 (1987). Thus, collateral estoppel principles, which Granite State admits will apply here (Pet. Brief at 32), will create further entanglement.

Rather than settling the issues presented in this litigation, ongoing parallel proceedings with the prospect of conflicting decisions are likely only to confuse matters, not resolve this dispute. The sound policy of avoiding piecemeal adjudication is especially strong here, where only the state court suit even offers the prospect of a full and complete adjudication.

C. *Uberrimae fidei* does not alter the character of this controversy.

Granite State seeks to bootstrap federal jurisdiction through its claim that the admiralty doctrine of *uberrimae fidei*, and thus federal law, applies. For two reasons, *uberrimae fidei* does not alter the character of these proceedings.

The first reason is that, even if the doctrine of *uberrimae fidei* is considered to be valid today, such a maritime doctrine is not applicable to this case because the subject matter of this dispute has no connection to maritime activities and does not fall within the court's admiralty jurisdiction. Second, because of the decreasing application of the doctrine in recent years, the doctrine of

uberrimae fidei is no longer recognized as entrenched federal precedent. As such, it should not be elevated above state law.

1. The disputed contract does not have the requisite "salty flavor" to invoke admiralty jurisdiction.

This dispute relates solely to the inland coverage provisions in an marine open cargo policy. Tandy's claim under the inland coverage provision of the policy is based upon damage to inventory at an inland warehouse/assembly plant that was caused by rioting workers. No maritime interests are implicated.

The "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2074-75 (1991). Additionally, admiralty is not concerned with the form of this action, but instead with the substance. *Id.* at 2076. If the subject matter of the suit is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty jurisdiction, then admiralty jurisdiction does not encompass the claim. *See Atlantic Mut. v. Balfour MacLaine Int'l*, 968 F.2d 196, 199-200 (2nd Cir. 1992).

Tandy's claim relates solely to the inland or shore coverage provision in the maritime insurance policy and is so attenuated from the business of maritime commerce that it does not fall within the purposes underlying admiralty jurisdiction. Thus, admiralty principals, including *uberrimae fidei*, do not apply.

Even if maritime interests were implicated, application of the principles that govern "partially maritime" or "mixed contract" matters lead to the conclusion that this case does not fall within the federal court's admiralty jurisdiction. *See Kuehne & Nagle v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989). Admiralty jurisdiction may be invoked only where a contract is "wholly maritime" or in the event an exception to this rule exists. None of the exceptions exist here. Therefore, because of the non-maritime obligation in the policy to provide inland coverage for

Tandy's inventory, the contract is not "wholly maritime." Instead, the insurance policy at issue is a "mixed contract."

When the maritime and the non-maritime obligations are separable, the court has admiralty jurisdiction only over the maritime aspects of the contract. *Balfour McClaine*, 968 F.2d at 199. The dispute in this case involves no maritime activities or obligations. This dispute, like the dispute in *Balfour McClaine*, involves only the non-maritime aspects of an marine open cargo policy.

Consequently, the dispute at issue does not have the requisite "salty flavor" of a maritime contract. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961). Granite State's claims that application of *uberrimae fidei* alters the character of this dispute are without merit.

2. The doctrine of *uberrimae fidei* is not elevated over state law.

Marine insurance contracts are governed by state law unless there is an established federal admiralty law that controls the disputed issue. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14 (1955). While the doctrine of *uberrimae fidei* still exists to some degree in federal maritime law, the doctrine is no longer recognized as entrenched federal precedence so as to elevate the doctrine over state law. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 279 (1991). The *uberrimae fidei* doctrine's "spotty application in recent years — even in other circuits — suggests that the *uberrimae fidei* doctrine is entrenched no more." *Id.* at 889-90. The doctrine's applicability to marine insurance contracts has been increasingly reduced. Therefore, for this additional reason, the doctrine does not apply to the marine cargo insurance policy between Granite State Insurance Company and Tandy.

II. The *Colorado River* and *Moses H. Cone* factors themselves run substantially parallel to the criteria that have historically been deemed relevant to a court's determination of whether to accept or decline jurisdiction over a declaratory judgment action.

Even applying the factors set out in *Colorado River* and *Moses H. Cone*, the district court in these cases properly determined to refuse to exercise jurisdiction.

Under *Colorado River* and *Moses H. Cone*, this Court set out the following factors in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

(1) the avoidance of exercise of jurisdiction over particular property by more than one court;

(2) the inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the concurrent forums;

(5) the applicability of federal or state law to the merits of the claims at issue; and

(6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n.3 (1st Cir. 1986).

The district court addressed these factors and to the extent they apply, they overwhelmingly support abstention. (Order at 8).

A. The first factor is irrelevant here. The second factor, inconvenience of the federal forum, supports the district court's decision to decline to hear the case. The district court explained its application of this factor as follows: "Even considered in the light most favorable to [Granite State], this court does not represent the most convenient forum for the parties." (Order at 8, 9). Indeed, the only entities located in the Southern District of Texas are Granite State's attorneys and adjusters.

All of the parties are incorporated and have their principal place of business in different locations — all distant from this forum. (Order at 8, 9). The district court noted:

> If, as [Granite State's] attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant parties.

(Order at 8, 9). This factor was never challenged and is binding on Granite State.

B. Perhaps more than any other, the factor concerning the danger of piecemeal litigation weighs in favor of abstention. (*See supra* § I.B.3). The avoidance of piecemeal litigation should be given great weight in declaratory judgment actions because such actions complicate and fragment the trial of cases and cause friction between state and federal courts. *Lumberman's Mut. Cas. v. Connecticut Bank & Trust,* 806 F.2d 411, 414 (2nd Cir. 1986). As the district court wrote, Tandy could conceivably proceed to trial on its claims against Granite State and thus force Granite State to litigate some, if not all, of its claims regarding coverage.

(Order at 9). The administration of justice would be better served if all the potential disputes resulting from Tandy's claim were resolved in one suit.

C. The fourth factor, the order in which jurisdiction was obtained by the concurrent forms, also favors abstention. The district court found that Granite State brought this suit to forestall a foreseeable state court suit by Tandy. (Order at 9, 10).

D. The additional factor of absence of progress in the federal litigation supports abstention. In the federal case, there had been virtually no progress. Tandy had not taken any action other than to file an answer, the motion for abstention, and related briefs, and Granite State has merely filed its complaint and response to the defendants' motion. (Order at 10).

E. Finally, the state court proceedings adequately protect Granite State's rights. The district court determined that:

> [Granite State] has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding.

(Order at 11). In fact, all relief Granite State seeks here is available in the state action.

Accordingly, even if *Colorado River* and *Moses H. Cone* apply, the district courts properly applied the factors for consideration of whether a federal court should abstain from hearing the case due to a pending state court action. The court's findings meet the bases set out in *Colorado River* and *Moses H. Cone* for abstention.

III. Under either a *de novo* or abuse of discretion standard, the district court's stay order was proper.

Granite State also complains of the failure of the Fifth Circuit to review the district court's decision to stay *de novo* rather than by an abuse of discretion standard. As applied to this case, which

standard applies is irrelevant. The stay order would have been upheld regardless of the standard of review used.

This is an insurance dispute governed by issues of state law. (Order at 4). In addition, Granite State was forum shopping when it filed the federal suit. It did not deny coverage until after it had filed the declaratory judgment action and, because of the tenor of the parties' relations during the investigation, there can be no dispute that Granite State expected Tandy to file suit if the claims were denied. Finally, the federal suit would be duplicative because it would not resolve disputes with other parties; while the state suit will resolve disputes with all the parties. Review of these factors by *de novo* review rather than by an abuse of discretion standard would not change the result.

Some circuits use *de novo* review rather than an absence of discretion standard. In spite of the different standards, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Granite State's own authority.

Four of the five cases cited by Granite State that review abstention *de novo* in declaratory judgment actions (Pet. Brief at 25) support Tandy's position, because in them the court of appeals ordered abstention. *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins. v. Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvestor Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976). In each of these cases, the district court had actually assumed jurisdiction over the declaratory judgment, and the appellate court reversed the district court's refusal to abstain.

Only one of the cases relied upon by Granite State actually resulted in abstention. In that case, the determination that abstention was improper hinged on a factor not present here. In *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), state law provided no adequate remedy. State law would

not have allowed resolution of a declaratory judgment until the underlying claim had been resolved. Here, state law provides an adequate remedy.

Nonetheless, as a general principal, an abuse of discretion standard is appropriate for review of an district court's decision to abstain. *See infra at § I.*

Granite State's apparent contention is incorrect that an abuse of discretion standard permits district court's "unfettered discretion." (Pet. Brief at 28.) Broad discretion is not absolute discretion.

In *Brillhart*, this Court counseled district courts to:

> Ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding in the state court . . . The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Brillhart, 316 U.S. at 495.

Therefore, in the exercise of its discretion over the declaratory judgment action, the district court must balance concerns of judicial administration, comity and fairness. The court's decision on this balance is subject to review and that review should be under a standard of abuse of discretion, not unfettered discretion.

CONCLUSION

Tandy Corporation is entitled to have all disputes related to its insurance coverage and the losses it sustained in Korea determined in a single suit. The declaratory judgment suit brought by Granite State cannot provide that relief.

The district court recognized that the suit filed by Granite State is a preemptive, forum shopping action that Granite State now virtually admits it was. In exercising its discretion and in recognition that the state action brought by Tandy was, in fact, the proper forum in which all issues can be resolved, the district court properly stayed the action below in favor of the state action. In reviewing the action of the district court, regardless of the standard of review applied, the result is the same. The district court acted properly.

For these reasons, Tandy Corporation asks this Court to affirm the judgment of the Fifth Circuit and of the district court.

Respectfully submitted,

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